No. 03-1269

IN THE

Supreme Court of the United States

ALFRED CASTELLANO,

Petitioner,

v.

CHRIS FRAGOZO and MARIA SANCHEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a 42 U.S.C. § 1983 malicious prosecution claim exists under the Fourth Amendment.

2. What damages are recoverable under a § 1983 Malicious prosecution claim under the Fourth Amendment.

3. Whether Fed. R. Civ. P. 51 requires a plain error review where the Respondent's failed to object to the jury charge, stating distinctly the matter objected to and the grounds of the objection, and if so, whether the jury instruction in this case constitutes plain error?

4. Whether the *Parratt* doctrine prohibits a federal remedy under the Due Process Clause of the Fourteenth Amendment where state common law provides an adequate remedy?

PARTIES TO THE PROCEEDINGS

Petitioner, Alfred Castellano was the Plaintiff-Appellant in the Fifth Circuit below, and Plaintiff in the District Court. Respondents Chris Fragozo and Maria Sanchez were the Defendants-Appellants in the Fifth Circuit below, and Defendants in the District Court. The City of San Antonio and Alfred Castro were Defendants in the District Court but were not parties in the appellate proceedings below.

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OPINIONS BELOW

The Fifth Circuit Court of Appeal's *en banc* decision is published at *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). (Pet. App. 2a)[1]. No party sought rehearing of the Fifth Circuit's *en banc* decision. The Fifth Circuit's opinion granting Cross-Petitioners' Petition for Rehearing *En Banc* is published at *Castellano v. Fragozo*, 321 F.3d 1203 (5th Cir. 2003) (Pet. App. 73a). The Fifth Circuit panel decision is published at *Castellano v. Fragozo*, 311 F.3d 689 (5th Cir. 2002). (Pet. App. 75a). The District Court's Order of Judgment is unpublished. (Pet. App. 165a).

STATEMENT OF JURISDICTION

The Respondents do not dispute the Petitioner's statement concerning this Court's jurisdiction being invoked in this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

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1. As authorized by Supreme Court Rule 12.5, Respondents have not reproduced herein the materials already produced in Petitioner's Petition in Appendix A through E, numbered 1a -175a. This material is referred to as "Pet. App." herein.

> and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Fourteenth Amendment Due Process Clause provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

U.S. Const. Amend. XIV, § 1.

Section I of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, except that in any

> action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

Rule 51 of the Federal Rules of Civil Procedure, as amended, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Respondents, with a few exceptions, do not dispute the Petitioner's statement of the case.[2] However, Respondents consider it important to clarify that Fragozo was not employed by Fred's Fish Fry, Inc. at the time of the arson and had not been for several months. Additionally, Castro was in fact a fireman assigned to the arson investigation squad, and not a police officer as suggested by Petitioner's statement of the case.

Additionally, Respondent believes the events that led to reversal and dismissal of Petitioner's conviction for arson upon his third habeas corpus attempt need to be clarified. Petitioner's conviction was upheld upon direct appeal, and his first two habeas petitions were denied by the trial court without hearing.

Upon his third petition for post-conviction habeas corpus relief, the trial court granted an evidentiary hearing at which Clemencia Jimenez was the primary witness to testify on Petitioner's behalf, and neither Respondent herein was called to testify nor given an opportunity to respond in opposition to her testimony. Consequently, the trial court made findings of fact and conclusions of law which recited that "Clemencia Jimenez was a credible witness and her testimony was neither contradicted nor rebutted.[3] The Texas Court of Criminal Appeals' opinion was, therefore, handed down without either Respondent herein having been provided an opportunity to

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2. For the most part, Petitioner's statement of the case is a verbatim recitation from the Fifth Circuit's *en banc* decision. Pet. App. 4a - 6a.

3. *See Ex Parte Castellano*, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993).

defend themselves from the accusations by Jimenez. Furthermore, at the trial of this case in federal court, the trial court granted Respondents' motion in limine as to the specific findings of the Texas Court of Criminal Appeal and allowed Petitioner to merely present evidence that his conviction was reversed for insufficient evidence.

Finally, Respondent believes Petitioner has misstated the relief accorded by the Court of Appeals. The Court of Appeals remanded the case for a new trial on Petitioner's federal and state claims under the Fourth and Fourteenth Amendments and any state claims he may have.

REASONS FOR DENYING THE PETITION

1. Respondents concede the existence of a conflict among the United States Courts of Appeals regarding whether a 42 U.S.C. § 1983 malicious prosecution claim, standing alone, exists under the Fourth Amendment, but argue Petitioner waived any review by this Court.

Respondents concede that the Courts of Appeals are in conflict regarding whether a malicious prosecution claim, standing alone, violates the Fourth Amendment, and is therefore actionable pursuant to 42 U.S.C. § 1983. In fact, this Court, citing from the Court of Appeals' decision in the *Albright* case, noted that to "the extent to which a claim for malicious prosecution is actionable under § 1983 is one 'on which there is an embarrassing diversity of judicial opinion.'" *Albright v. Oliver*, 510 U.S. 266, 270 n.4 (1994) (citing from *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992), which cited from *Brummet v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991). In this regard, the Fourth, Sixth, Seventh and Eleventh Circuits have rejected the view that a plaintiff must

simply satisfy the elements of an analogous common law tort of malicious prosecution in order to state a claim under § 1983. *See, e.g., Lambert v. Williams*, 223 F.3d 257, 262-62 & n.2 (4th Cir. 2000); *Franz v. Village of Bradford*, 245 F.3d 869, 877 (6th Cir. 2001); *Newsome v. McCabe*, 256 F.3d 747, 750 (7th Cir. 2001); *Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002); and *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). The Fifth Circuit has now adopted that position. *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). More recently, the Tenth Circuit joined this view. *Pierce v. Gilchrist*, 359 F.3d 1279, 1290 (10th Cir. 2004).

Some of the other circuits, that is, the First, Second, Third and Ninth Circuits, have taken the opposite view that a plaintiff may state a cause of action for a constitutional malicious prosecution action by satisfying the elements of a common law malicious prosecution claim. *See, e.g., Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995); *Donahue v. Gavin*, 280 F.3d 371, 380 n.16 (3d Cir. 2002); and *Poppell v. City of San Diego*, 149 F.3d 951, 961-63 (9th Cir. 1998).

Notwithstanding the admitted diversity on this issue, Respondents argue that Petitioner's failure to appeal the lower court's consolidation of the state law malicious prosecution action with the § 1983 claim should bar this Court's review of this issue. Moreover, as stated by Judge Barksdale below, the Petitioner ". . . turned his back on the one claim he had under federal law — the Fourth Amendment." (Pet. App. A. p. 68a). Instead, Petitioner argued in the Court of Appeals that the judgment below was correct. Petitioner should not be allowed to present the question of the existence of a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983 for the first time to this Court. Respondents therefore respectfully request this Court deny Petitioner's Petition on this question.

2. It is unnecessary to grant this petition on Petitioner's question concerning damages recoverable under a § 1983 malicious prosecution claim under the Fourth Amendment since a review of damages is not before this Court.

Petitioner requests this Court to decide what damages are recoverable under a § 1983 malicious prosecution claim under the Fourth Amendment, yet this inquiry is moot herein since the Fifth Circuit's *en banc* decision reversing and remanding the judgment in this case vacated all damages in this case. Depending on this Court's decision whether to review this case, and ultimate ruling, it will most likely be necessary to remand this case to the Fifth Circuit, or the trial court for retrial and consideration of damages, if any. Until that occurs, any examination of damages recoverable under a § 1983 malicious prosecution claim under the Fourth Amendment, if one exists at all, would be theoretical and result in an unnecessary advisory opinion by this Court. In any event, with regard to damages for a § 1983 claim for violation of constitutional rights, this Court has provided a starting point for consideration of damages in *Cary v. Piphus*[4] when it observed:

> Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the injury under § 1983.

The Court should, therefore, refuse to grant this petition as to this question.

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4. 435 U.S. 247, 257-58 (1978).

3. It is unnecessary to grant this petition on Petitioner's question concerning plain error review since the Fifth Circuit's decision in this case did not hinge on error in the jury instructions.

In his petition, Petitioner argues that ". . . all of the questions /in this case/ should have been moot . . .", and that the Fifth Circuit, ". . . deviated from accepted appellate practice and willfully ignored Federal Rule of Civil Procedure 51, applying an abuse of discretion standard rather than a plain error review to the jury charge." (Pet. 22-23). The Fifth Circuit's *en banc* decision held that " 'malicious prosecution' standing alone is no violation of the United States Constitution, and to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law." (Pet. App. 2a). It did not primarily hinge on error in the jury instructions.

With regard to the jury instructions, the Fifth Circuit *en banc* opinion states, "under the unique circumstances of this case, we apply an abuse of discretion standard, rather than plain error." (Pet. App. 29a). However, in doing so, the Court notes that the Defendants did:

> object to allowing the jury to consider wrongful conviction as a claim under the Fourth and Fourteenth Amendments, making their legal position clear to the magistrate judge both by their motions for judgment as a matter of law, as well as by explicit renewal of those motions at the charge conference in response to the judge's invitation to lodge any objections to the proposed charge. Moreover, defendants' appeal from the district court's denial of judgment as a matter of

> law, and its rejection of the contention that the Fourth Amendment would not support claims arising from the trial.

(Pet. App. 30a).

Furthermore, in a footnote, the Court of Appeals further clarified its basis for applying an abuse of discretion standard to this case stating:

> Nevertheless, given the unusual procedural history of this case, and the fact that the nature of the defendants' continued objections to submitting the case went to the heart of this error, an abuse of discretion standard is appropriate.

(Pet. App. 30a n.8).

While taking great pains to explain its reason for applying an abuse of discretion standard to this case in light of Respondent's continued objections to the legal issues raised by this cause, it is clear that the Fifth Circuit did not arbitrarily chuck Rule 51 out the window while deciding which standard of review to apply to this cause as suggested by Petitioner, but rather took a well-reasoned approach in applying the abuse of discretion standard to this case. The Fifth Circuit has stated that "no party has the power to control our standard of review. A reviewing court may reject both parties approach to the standard." *United States v. Vontsheen*, 950 F.2d 1089, 1091 (5th Cir. 1992). The Fifth Circuit did not act arbitrarily in deciding that Rule 51 was not the appropriate standard of review to apply to this case. This Court should not second guess the Fifth Circuit's application of the abuse of discretion standard and should not grant the petition as to this question for review.

4. It is unnecessary to grant this petition for certiorari on the question whether the *Parratt*[5] doctrine prohibits a federal remedy under the Due Process Clause of the Fourteenth Amendment where state common law provides an adequate remedy.

Petitioner seeks review of whether the *Parratt* doctrine applies in the context of the Fifth Circuit's newly recognized Fourteenth Amendment cause of action. In support of his request for review on this issue, Petitioner points to Judge Jones' acknowledgment of Judge Barksdale's powerful argument for the application of the *Parratt* doctrine to this case, and that Judge Jones, while apparently somewhat persuaded by that argument, feels compelled to adhere to the other circuits' allowance of similar claims without application of *Parratt* in the absence of guidance from this Court. "While this position may prove correct, we have no post-*Parratt* guidance from the Supreme Court, . . . " (Pet. 22, Pet. App. 46a-47a).

Obviously, the Fifth Circuit did not apply the *Parratt* doctrine to the case *sub judice.* Moreover, the focus of this case is the existence of a 42 U.S.C. § 1983 malicious prosecution claim under the Fourth Amendment, as stated in Petitioner's other questions. Petitioner's claim should therefore be analyzed under the Fourth Amendment without reference to the more general considerations of due process, and his petition for review of the applicability of the *Parratt* doctrine to the facts of this case denied. In fact, the Fifth Circuit's *en banc* ruling expressly held that *Parratt* was inapplicable, stating:

> . . . (A) state's manufacturing of evidence and knowing use of that evidence along with perjured

5. *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).

> testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause, a deprivation of a right not reached by *Parratt*.

(Pet. App. A. 3a),

. . .

> Nor is there serious suggestion that the *Parratt* doctrine is applicable to *Castellano's* claim that the manufacturing of evidence and use of perjured testimony at trial leading to his wrongful conviction denied him due process.

(Pet. App. A. 35a),

. . .

> . . . (W)hile *Castellano's* due process claims are not properly rejected by the principles of *Albright* and *Parratt*, whether they survive the absolute immunity given witnesses in a criminal trial or whether the fabrication of the tapes could have been a legally sufficient cause of the wrongful conviction, we leave to the district court on remand.

(Pet. App. A. 39a).

However, in the event this Court determines a due process analysis of this claim is appropriate, Respondents believe this Court should review the applicability of the *Parratt* doctrine to the facts of this case.

CONCLUSION

This Petition for Writ of Certiorari should be denied. However, in the event it is granted, Respondents submit that, to accord fairness and complete justice in this case, the Court should also grant their Conditional Cross-Petition for Writ of Certiorari.

Respectfully submitted,

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